Hudood Ordinances

Mufti Taqi Usmani

Islamization of Laws in Pakistan: The Case of *Hudud* Ordinances

Mufti Muhammad Taqi Usmani[1]
Translated by Khalid Rehman

Abstract: Ever since the creation of Pakistan, the issue of Islamization has been a subject of debate both within and outside the country. Islamization of laws is an important element of the overall concept of Islamization in the country, and this aspect generated great discussion and deliberations in 1979 when the government introduced *Hudud* Laws (Ordinances).

An objective study of the views and response to the Ordinances indicates the existence of three opinions. There are people who think that since *hudud* are prescribed in the Qur'an and Sunnah, one cannot think of changing or amending them. Some are opposed to the very idea of Islamization, so they call for a total repeal of the Ordinances. The third group consists of those who support the idea of Islamization and, in fact, consider it Pakistan's *raison d'etre*, but feel that the Ordinances might be in need of review and amendments, even though the *hudud* are certainly divinely ordained. They are of the view that, surely, it is the Qur'an and Sunnah that prescribe *hudud*, but their translation into laws is a human effort that needs continuous review to adjust to the demands of changing times.

This analysis, with its focus on the *Hudud* Ordinances, seeks to help in creating an understanding of the entire debate on Islamization of laws in Pakistan. The task is onerous, delicate and complex. Underscoring the importance of implementation of Islamic laws, and refuting the allegations of opponents, the article also identifies some of the areas in the *Hudud* Ordinances, specially the *Hudde Zina* Ordinance, that are in need of reform.

---

[1] The author is a former judge of the Federal Shariah Court and the Supreme Court of Pakistan (Shariah Appellate Bench).

Introduction

The country has been in the grip of a raging debate on the issue of the *Hudud*[1] Laws ever since they were introduced in 1979. There are some who ask for complete repeal of these laws, others who insist on keeping them as they are, and a third group calling for amending and reforming these laws to make them more responsive to human and social conditions.

Presented here is a dispassionate analysis of these, so-called 'controversial,' laws for a better understanding of the actual situation.

The analysis is divided into three parts. The first part discusses briefly the importance of the injunctions of Islamic Shari'ah; the second part addresses the questions and doubts that are raised, furiously and frequently, about the *Hudud* Laws; and the last part focuses on those aspects that, to this scribe, are in need of review, amendment and reform.

Hudud and their Place in Shari'ah

As far as the importance of Shari'ah injunctions is concerned, it does not need to be impressed upon Muslims for the simple reason that when they profess the *kalima*, confirming the oneness of Allah and the prophethood of Muhammad ﷺ (peace be upon him), they proclaim that they will observe Allah's commands by following the example of the Prophet Muhammad ﷺ in all walks of life. Needless to say, these commands and teachings are not confined to acts of worship (*ibadah*) but cover all aspects of life – including criminal law of which the *Hudud* Laws are a part.

The '*hudud*' are the penalties that the Qur'an and Sunnah of the Prophet have prescribed for certain crimes. Notably, Islamic criminal law is quite lenient in this matter in that it prescribes punishments for only a few crimes. For all other crimes, there is no permanent prescription for specific punishments, and the task of imposing punishments has been left to the ruler and the judge, i.e., the legislature and judiciary in modern society. It is these institutions that can prescribe punishments for different crimes according to the demands of the time and prevailing conditions. These punishments are called '*tazir*[2],' while those prescribed in the Qur'an and Sunnah are called '*hudud*.'

Theft, robbery, *Zina* (fornication, adultery and rape) false accusation and drinking are crimes for which *hudud* have been prescribed.[3] In Pakistan, the *Hudud* laws were enforced in 1979 and the ordinances regarding these crimes are commonly referred to as the *Hudud* Ordinance.[4]

Why immutable punishments were prescribed for these particular crimes and not others, and why these too were not left to the discretion of the legislature and the judiciary is beyond this article's purview. I would rather limit myself to submitting that Divine Revelation insists on something only where human intelligence is unable to move or vulnerable to mistake. So, the issue is settled with a direct command contained in

Revelation, instead of being left to human intelligence. Whether one—an individual or a people—understands the wisdom behind the command or not, it is binding in all circumstances. In such situations, compliance with the command accrues invisible yet not totally imperceptible benefits, but the chain of cause and effect remains beyond human discernment. Such is the case with *hudud*, too, perhaps.

This underscores the importance of enforcement of *hudud* in an Islamic state. It is understandable that there can be different views with respect to setting priorities in the formidable task of transforming an entirely non-Islamic legal system into an Islamic system. However, there cannot be two views about the importance of enforcement of *hudud*.

Hudud Laws and Islamization Debate in Pakistan

It is true that *hudud* laws are only one element of the Islamic legal system; in other words, the Islamic legal system is not solely about *hudud*. Besides legal means for discipline, Islam also gives non-legal teachings for the reform of society, which greatly help in curbing crimes. This implies that an Islamic state cannot absolve itself of its duties by just enforcing the *hudud*; it is also responsible for creating an atmosphere that discourages the incidence of crime in the first place. However, this does not provide sufficient grounds for the objection, sometimes raised, that it is unjust to enforce Shari'ah laws consisting of harsh punishments in a society where no other thing is Islamic and where media is spreading waywardness in the youth. Building on this objection, some even say that unless all the sources that instigate violence and crime are eliminated, and until a model Islamic society is established, laws like the *Hudud* Ordinances should not be introduced.

This objection is unreasonable. For one thing, there is no doubt that the very enforcement of *hudud* in letter and spirit plays a significant role in creating such an environment, and it is therefore not right to postpone their enforcement until the establishment of such an environment. Moreover, it must be appreciated that the establishment of a model Islamic society is an onerous task, and it would be impossible to assess when a society had become 'sufficiently Islamic' for enforcing *hudud*. The model society that Islam seeks to establish is an ideal that requires continuous and unflinching struggle to be realized. Laws are made and enforced to curb evil and to move the society closer to the ideal, and the *Hudud* Ordinance seeks to serve this purpose.

The criticism that harsh punishments of death and lashing are uncalled for in prevailing conditions, which consist of too many temptations, offers no solution to the problem. Instead of being scrapped altogether, the law should be improved to effectively check the spread of evil from society.

It is important to note that the *Hudud* Ordinances are not 'static.' It is for the courts to decide each case, keeping in view specific details, the context in which the crime took place, as well as the condition of the accused. In Shari'ah, even a small plausible doubt

suffices to annul *hadd* punishments. The importance of this condition can be gauged from the fact that no accused has been awarded a *hadd* punishment since 1979; all of those convicted were given '*tazir*' punishments. This underlines the reasoning that, instead of waiting for society to become Islamic (as if this would come about by some stroke of magic!) before enforcing Islamic laws, the wise course would be to continue with Islamization of laws as a step towards Islamizing society.

Before proceeding further, it needs to be realized that whereas the laws ordained by Allah and His Prophet are sacred, and there is no room for doubts about it, when these laws are codified, that code of law represents human effort, which is not infallible, but susceptible to mistake. The drafting of any law is a very delicate undertaking. All possible situations have to be kept in mind and provided for in words. Since human intelligence, being limited, cannot visualize all kinds of circumstances in advance, there is always a possibility of flaws and weaknesses in any piece of law. The *Hudud* Ordinances are no exception. They might suffer from weak drafting. They might contain some aspects that are in need of review and improvement. Without changing the injunctions of Shari'ah, as commanded by Allah and enforced by His Prophet, the process of change and improvement in its implementation can theoretically go on forever, as indeed it should. Of course, this process should be guided by objective critique and not hostility.

It is unfortunate that polarization has kept the doors shut for such an objective approach. Whenever a proposal concerning some issue is raised at the political level, people get divided into two camps: while one fails to see any good in it and calls for its total repeal, the other fails to notice any flaw in it and deems it heretical to even think about amending it. This is what is happening in the case of the *Hudud* Ordinances also.

There is a group that, instead of undertaking a critical analysis, is raising unfounded objections against the *Hudud* Ordinances. These people, many of whom are in fact against the very concept of enforcement of any Islamic injunction as a law, are not ready to accept anything less than its annulment. They represent the secular mind that holds that religion is a private matter between man and his God, and it should not interfere in the affairs of the state. An added factor that has lent stiffness to their opposition to *Hudud* laws is that these laws top the list of Islamic injunctions that are the target of many circles in the West as well.[5] Thus, they can be expected to oppose the Ordinances tooth and nail, no matter how flawless they become or how pristine a shape they assume.

The dilemma facing these people is that they cannot openly say in a Muslim society, as Pakistan's is, that Islamic laws are not acceptable to them. So they adopt an 'indirect' approach. Instead of raising objections against Islam or its legal system, they find fault with the man-made drafted laws. In the case of the *Hudud* Ordinances, they have deemed it most useful to term them anti-women. This is how they try to raise the concerns of the international community and solicit its support for their political ends.

Some Critical Issues

Harshness of the *Hadd* Punishments: Much hue and cry has been raised against the harshness of the *hadd* punishments. In any action, it is human psychology to compare prospects of profit against possibilities of loss, and opportunities against dangers. If the prospects of profit are greater than the danger of loss, one goes ahead; if not, one refrains from the undertaking. In committing crimes, similarly, one is lured by a temptation, but deterred by the prospect of punishment. If, in one's reckoning, the pleasure of the crime exceeds the pains of punishment, one may commit it; but if the deterrence is greater than the urge, one would be more likely to refrain. Shari'ah has prescribed punishments keeping in view this human psyche and nature. The more heinous the crime, the harsher is the punishment, so that the society is purged of wicked and depraved elements.

As for the 'brutality' of the punishment of stoning to death (*Hadd* punishment for adultery and rape), it should be realized that it is, in fact, a kind of death sentence. In numerous laws around the world, many crimes incur a death sentence, which might be administered through various forms, such as hanging, decapitation, gas chamber, electric shocks, injection, bullet-fire or stoning. The methods are different but the punishment is the same. It is therefore not so relevant to debate that a bullet kills instantly and with greater efficacy, while stoning protracts the incidence of death. At times a bullet does not hit the right mark and death is delayed, while a stone hits its point and results in instant death.

In any case, the argument that death should be swift goes against the purpose of this punishment: without its 'torment' and gravity, the sentence of death would lose much of its meaning. This is borne out by the fact that people are not afraid of death as much as they are of undergoing the agony of death.

Aside from plain logic, if those who are worried about the death sentence for adultery consult the statistics, they would know that cases of death on account of adultery are fewer than half of the deaths in other cases. While no one can condone the killing in the name of honor, the current situation in our society is that when a man finds his wife or sister or daughter in a 'compromising relationship' with someone, he himself kills her along with the paramour. At times, the methods employed for the murder of the wrongdoer are even more drastic and severe than stoning to death. So, the punishment of stoning to death is a pragmatic realization of the actual situation and a measure to rectify it, along with providing a better system for the elimination of crimes.

Similarly, to say that the punishment of lashes (*Hadd* punishment for fornication, drinking and false accusation) is against human dignity is itself against the dictates and demands of respect for humanity. If a person ignores his or her own dignity and impinges on others', why shouldn't there be a punishment that forces him or her to correct this behavior? To punish one or two for their wrongdoing in order to deter other criminal-minded elements and to protect the rest is better than letting criminals get away with their crimes and morally harm the social fabric.

Discriminatory against women: It is said that the *Hudud* Ordinances are discriminatory to women, that they have made women victims of all kinds of injustices, and that they have been handed down punishments for wrongs they have not committed.[6] This view has been repeated ad nauseam until even neutral elements have become suspicious about the purpose of the Ordinances.

There is one clause in the *Zina* Ordinance – clause 8(b) about women's witness – on account of which it can be said that it discriminates between men and women. Yet, not a single woman has ever been punished on the basis of this clause, nor has it made any significant difference in practical terms. This issue is discussed later in this article, but what needs to be stressed here is that the allegation of discrimination against women is totally baseless with respect to the other clauses of this Ordinance. This allegation is leveled without studying the laws and their implications, and amounts to giving such meanings to the laws, just to oppose it, that are not even intended. This has led to ridiculous situations. The following two examples expose the true depth of such allegations.

The *Qazf* Ordinance is one of the *Hudud* Laws.[7] '*Qazf*' means leveling a false accusation in *hadd* cases. The intent of the law is that if one is accused falsely of committing a crime liable to *hadd*, one can seek punishment from the court against the false accuser. While Shari'ah has declared such crime highly serious, it has prescribed a punishment of 80 lashes for it. The *Qazf* Ordinance is there to enforce this punishment. Clause 8(a) states who can file a complaint of *Qazf*:

> If the person in respect of whom the *Qazf* has been committed is alive, that person or any person authorized by him…

It is the use of 'him' here that has become the bone of contention. It is an established rule of law that the masculine pronoun is inclusive of both men and women. This is the situation with most of the laws of the world. But, since this Ordinance had to be condemned as anti-women, its opponents picked the issue of a pronoun to claim that it allows only men to file complaints.

If such allegations come from some ignorant people - those who do not understand legal language - their otherwise baseless protests are understandable. But, surprisingly, this objection was raised by the National Commission on the Status of Women, which was appointed to review the Ordinances and included legal experts. Its comment on section 8(a) of the *Qazf* Ordinance is:

> It is obvious from the wording used in this clause that the drafters of this law overlooked and completely ignored women… excluding the term 'her' means that it is only a man against whom *Qazf* is committed is eligible to file a complaint.[8]

This was done to indicate that the Ordinance is discriminatory, allowing men to approach courts for redress against false charges of illicit relations, but not women. The blatant bias in this charge becomes even clearer when one considers that Clause 2(b) of the Qazf Ordinance says that Pakistan Penal Code is applicable to this law – and Clause 8 of Pakistan Penal Code's clearly states:

> The person 'he' and its derivatives are used for any person, whether male or female.

The second example of a baseless charge pertains to the *Zina* Ordinance. Clause 5(1)(a) of the *Zina* Ordinance attempts to define the crime of *Zina* in the following terms:

> *Zina* is liable to *hadd* if it is committed by a man who is an adult and is not insane, with a woman to whom he is not, and does not suspect himself to be, married.

Here, the objection raised is that while the word 'adult' has been used for a man, it has not been used for a woman. The reason, however, is clear. If a man who has committed *Zina* is not an adult, *hadd* cannot be imposed on him; but if an adult man has committed the crime against a woman, whether adult or not, *hadd* can be imposed on him. Not setting the condition of being 'adult' for the woman ensures that *hadd* is imposed on a man who has raped any woman, whether she is an adult or a minor.

In this context, the recommendation of the National Commission on the Status of Women that, "As the term 'adult' has been used for a man, it should also have been used for a woman," is strange indeed.[9] It means that the crime would be liable to *hadd* only when an adult man has committed it against an adult woman; if an adult man has committed the same heinous crime against a minor girl, he would go scot-free. Clearly, the existing definition of *Zina* and its *hadd* in the *Zina* Ordinance ensures more rights for women than the draft recommended by the Commission.

The above two examples amply expose the depth of allegations, as well as the mindset, against the *Hudud* Ordinances. A similar example occurs in the Report of the Commission of Inquiry for Women,[10] which says that different clauses of the Ordinances are used against women and they are booked in false *hadd* cases for personal reasons. Some 80-90 percent of women prisoners are facing cases under these Ordinances and languishing in jails. This is factually wrong, as the statistics given below indicate.

Women Indicted in Various Cases during September 2003

Name of Jail	Number	Cases of Murder	Cases of Narcotics	Cases of *Hudood*	Miscellaneous
Adiala Jail Rawalpindi	125	24 19.2%	63 50.4%	31 24.8%	7 5.6%
Kot Lakhpat Jail Lahore	97	23 23%	26 26%	48 49%	-
Central Jail Karachi	280	70 25%	50 18%	80 28%	80 28%
Total	502	117 23%	139 28%	159 31%	87 17%

Source: Women AID Trust, Comparative Study of Hadd-e-Zina Ordinance 1979: With Pakistan Penal Code, Islamabad, Oct. 2003, p. 45.

Women Indicted in Various Cases in NWFP during July 2003

Name of Jail	Number	Cases of Murder	Cases of Narcotics	Cases of *Hudood*	Miscellaneous
Peshawar	58	5 8%	35 60%	10 18%	8 14%
Dera Ismail Khan	23	4 17%	12 52%	6 30%	1 50%
Kohat	29	2 10%	12 60%	6 30%	-
Mardan	18	4 22%	5 28%	7 38%	2 11%
Swat	16	5 31%	2 13%	6 38%	3 19%
Bannu	16	2 13%	6 38%	8 50%	-
Mansehra	7	3 43%	-	4 57%	-
Abbottabad	14	5 36%	-	9 57%	-
Total	172	30 17%	72 41%	56 32%	14 8%

Source: Women AID Trust, Comparative Study of Hadd-e-Zina Ordinance 1979: With Pakistan Penal Code, Islamabad, Oct. 2003, p. 46.

The above statistics make it clear how true is the allegation that *Hudud* Ordinances are used against women, and that 80-90 percent of women prisoners are facing cases under these Ordinances and languishing in jails.

Misuse by the law enforcing agencies: Since the clauses of the Criminal Code (1898) also apply to the *Zina* Ordinance, under its clause 20, the same procedure is observed from the filing of a case to its investigation and hearing. The Ordinance does not give a different or separate system or procedure. The problem lies in giving police unlimited and arbitrary powers. The police play the same role in *hadd* cases as it does elsewhere: bribery, mafiahood, injustice and oppression of the common man. The wrongdoings of

police are counted as the flaws of the Ordinances. This is another reason why the *Hudud* Ordinances attracts severe criticism.

Carrying out raids at houses, checking passers-by for *nikah* forms (marriage registration), arresting—especially women—on the basis of mere doubt, and treating the victim as the accused all speak of highhandedness of police. There is no room for this in Shari'ah. Then, while clause 173 of the Criminal Code stipulates 15 days for the completion of investigation, the police in fact do not complete it for months, and at times even years lapse without progress in cases. Challans are not sent, at least on time, to the courts. Witnesses that the police present before the court do not take an interest in the cases: they fail to present themselves before the courts on time, and sometimes do not respond to the courts' summons. These are among the reasons that also cause delay in *hadd* cases. The need, therefore, is to reform the police, rather than to do away with the law.

Another problem is that the entire system, not just the *Hudud* Ordinances, has become a ploy for the influential and the wealthy in our society. Law is used to subjugate the already oppressed and weaker element in society. So, rather than scrapping the Ordinances, the solution lies in their enforcement in letter and spirit.

Here, an important aspect is that the Criminal Code has been kept outside the purview of the Federal Shari'at Court (FSC). This is why the FSC has not been able to give suggestions to remove its flaws and weaknesses. It would not be wrong to say that it is the Criminal Code of 1898 that has failed, rather than the *Hudud* Ordinances.

Rape victims are booked in fornication crimes: Before the introduction of the *Zina* Ordinance, the Pakistan Penal Code (PPC 375 and 376) held it a crime if a man raped a woman against her will, i.e., *Zina bil-jabr*. However, it was not a crime if he committed it with her consent, *Zina bil-raza*. This amounted to a mockery of the law: a man could not marry another woman without the consent of his wife, since it was a crime, but could commit adultery with any other woman, because it was not a crime if committed with the consent of that woman. The Ordinance attempted to remove this discrepancy and declared *Zina bil-raza* a crime.

Those who were in favor of the old Anglo-Saxon law and did not want to declare *Zina bil-raza* a crime faced a problem. They could not say openly that *Zina bil-raza* should be allowed. Instead, they pursued their objective under the banner of "Elimination of Discrimination against Women" and held that victims of rape (*Zina bil-jabr*) do not report crimes against them for fear of being themselves booked for *Zina bil-raza*. Many women who are in fact victims of rape, it was claimed,[11] are languishing in jails while the men who violated them are roaming free!

Although this claim has been made repeatedly, the real situation is quite the opposite.

In my own experience of hearing cases concerning the *Hudud* Ordinances, first as a judge in the Federal Shari'at Court (FSC) and then in the Shari'at Appellate Bench of the

Supreme Court of Pakistan, I did not come across even a single case where a woman had filed a complaint of *Zina bil-jabr* but had instead been punished for *Zina bil-raza*.

A case that became quite known in this regard was the Safia Bibi case. She was a 21-year-old girl (wrongly reported in some newspapers as 13 years old), with a 9-month pregnancy. Her own father had registered a case that she had committed Zina. When arrested, she said that a man had committed *Zina* against her will. When she could not prove her case, the trial court announced imprisonment for three years for *Zina bil-raza*. But the case was appealed before the Federal Shari'at Court, which observed that when a woman had complained of rape against her, the *hadd* of *Zina* cannot be imposed on her merely on the grounds that she was pregnant. Setting aside the sentence, the FSC acquitted her.[12]

It was this case that was used to say that women victims of rape were booked in crimes they did not commit! What needs to be noted is that it was not the girl who filed the case of her rape, it was her father, who had in fact registered a case against her, and it is no insignificant matter in Pakistani society that a father should register a case against his own daughter. Yet, when the case progressed and the girl said that she had been raped, the court acquitted her on the basis of her statement.

There might have been some incidents that did not come to my knowledge, but almost 90 percent of the hundreds of cases of kidnapping and rape that I heard during some 18 years as a judge resulted in punishments for the male offenders while the women went free. This was the situation even in cases where a woman had eloped with her paramour, and had insisted, as long as she remained with him, that she went out and got married to him of her own free will. However, when her parents managed to find her somehow, she said she was kidnapped and raped. The accused man, on the other hand, defended himself by saying that the woman went out with him on her free will and wanted him to marry her. Since he failed to furnish sufficient proof of the marriage, he received the punishment, but the woman was given the benefit of the doubt and was set free.

This is the view of other judges as well. Given the fact that elopement has not been declared an offense, they have taken a lenient view in favor of women. This is why it is men who receive punishments while women are acquitted.

The findings of the research of an American scholar, Dr. Charles Kennedy, are also worth sharing in this regard. Dr. Kennedy stayed in Pakistan and carried out a survey of cases under the *Hudud* Ordinances over a period of five years from 1980 to 1984. He writes: "Women fearing conviction under section 10(2) frequently bring charges of rape under 10(3) against their alleged partners. The FSC finding no circumstantial evidence to support the latter charge convict the male accused under section 10(2)…the woman is exonerated of any wrong-doing due to 'reasonable doubt' rule."[13] The following table gives the findings of the survey regarding the gender distribution of convictions.

Conviction by Gender, 1980-84

	District Courts				Federal Shari'at Court			
Crime•	**Male**		**Female**	**Total**	**Male**		**Female**	**Total**
10(2)	145	(56)*	144	259	71	(70)	30	101
10(3)	163	(99)	2	165	59	(100)	0	59
11	128	(97)	4	132	28	(93)	2	30
16	67	(86)	11	78	13	(100)	0	13
18	62	(100)	0	62	36	(95)	2	38
12	41	(100)	0	41	17	(100)	0	17
14	20	(91)	2	22	3	(60)	2	5
19	7	(78)	2	9	3	(100)	0	3
5	5	(56)	4	9	0	-	0	0
15	1	(100)	0	1	0	-	0	0
Zina (All)	639	(82)	139	778	230	(86)	36	266
Non-Zina	159	(95)	9	168	113	(98)	2	115
Total	**798**	(84)	**148**	**946**	**343**	(90)	**38**	**381**

•10(2) = adultery; 10(3) = rape; 11 = kidnapping; 12 = sodomy; 14 = conspiracy to engage in prostitution; 16 = enticement; 18 = attempted rape; 19 = abetment of *Zina* crime; 5 = adultery liable to *hadd*; 15 = deceitful marriage.

* Figures in parentheses refer to relevant percentages.

Source: Charles Kennedy, *Islamization of Laws and Economy,* Institute of Policy Studies, Islamabad, 1996, p. 63.

Studying the impact of 10(2), which is about *Zina bil-raza*, the survey found that the lower courts handed down punishments to 145 men, and the FSC maintained punishments in 71 cases, while the court upheld punishments in the case of just 30 women. In other words, only 30 women were given punishments. This is how jails are swelling with women!

As for 10(3), which is about *Zina bil-jabr*, the lower courts punished 63 men and only 2 women. The FSC upheld the punishment in 59 cases for men, and quash the punishment of the 2 women. This means that no woman was punished under this section during the five years.

False accusation and *Qazf*: An objection against the *Hudud* Ordinances is that, under clause 8(b), the *Qazf* Ordinance requires the raped woman to present four witnesses against the accused. As she fails to do so, she is held for leveling false accusation (*qazf*) against the rapist.[14]

The reality, however, is that there is neither such a likelihood under the Ordinance nor has it ever happened. The *Qazf* Ordinance clearly says that a woman who files a case of rape (*Zina bil-jabr*) but fails to prove her accusation will not be awarded a *Qazf hadd* as clause 3 of the *Qazf* Ordinance maintains that:

> It is not *Qazf* to refer in good faith an accusation of *Zina* against any person to any of those who have lawful authority over that person…

There are, however, three exceptions:

(a) A complaint makes an accusation of *Zina* against another person in a court, but fails to produce four witnesses in support thereof before the court
(b) According to the finding of the court, a witness has given false evidence of the commission of *Zina* or zina-bil-jabr.
(c) According to the finding of the court, complainant has made a false accusation of zina-bil-jabr.

Second Marriage of Divorced Women: Another objection that is leveled against the *Zina* Ordinance with vehemence[15] is that it punishes even those women who marry a second time after being divorced and having completed the period of *iddah*, when their ex-husbands register cases of *Zina* (adultery) against them under the Ordinance's clause 10(2).

However, the fact of the matter is that women have to face difficulties because of clauses 6 & 7 of the Muslim Family Laws Ordinance (MFLO)[16], promulgated during the Ayub era, in 1961, prior to the introduction of the *Hudud* Ordinances. It was laid down in the MFLO that divorce would be effective only when the husband had also sent a notice of divorce to the chairman of the union council. In other words, she would remain his wife, in legal terms, if he had not notified the union council about their divorce. This clause actually conflicts with Shari'ah, under which divorce does not need to be notified to any official authority to be effective. Without any such notice, the woman comes out of wedlock, and is free to marry any other person after completing the period of *iddah*. So, it was the MFLO, which was said to protect the rights of women, that made it difficult for women to marry a second time after being divorced because of ill-will and delay on the part of their former husbands, and gave them a pretext to file cases of adultery against their ex-wives after they had divorced them.

The *Zina* Ordinance, in fact, attempted to rectify this situation. Clause 494 of the Pakistan Penal Code prescribed, much before the introduction of this Ordinance seven years imprisonment for a woman for getting married to another man while being married to her husband. Malignant husbands could easily exploit this clause and, in fact, did register cases to have their former wives punished after they had divorced them. The *Zina* Ordinance brought about two changes in this regard. First, Pakistan Penal Code's clause 494 took the shape of clause 10(2) in the Ordinance with a sentence of 4-10 years. Setting a sentence that might vary from 4 to 10 years reflects an appreciation of the different circumstances in which the same crime might be committed. Secondly, when such cases were brought before the Shari'at Appellate Bench of the Supreme Court, it ruled that a woman could not be established as guilty of committing *Zina* (adultery) merely on this 'technical' ground (that her husband had not notified the authorities about their divorce)[17]. With this decision from the Appellate Bench, the door for misuse of clause 10(2) of the *Hudud* Ordinance was shut effectively. However, it is a fact that

persistence of Sections 6 & 7 of the Muslim Family Laws Ordinance read with Section 494 in the Pakistan Penal Code continues to provide room for harassing those women who are divorced but still face cases filed against them by their former husbands.

Rape v/s adultery (and Fornication): Yet another objection that certain quarters raise against the *Zina* Ordinance is that it does not distinguish between *Zina bil-jabr* (rape) and *Zina bil-raza* (adultery and fornication), although the former is more heinous and, therefore, warrants harsher punishment than the latter.[18]

This objection is untenable. The Shari'ah approach is more sophisticated. As logic would dictate, it does prescribe different punishments for rape and adultery or fornication. In other words, in addition to acknowledging the difference between the two situations, Shari'ah also takes into account the conditions under which the crime is committed.

If the committer is married '*muhsan*', then the *hadd* of *rajm* (stoning to death) is the punishment – whether he committed rape or conducted sexual intercourse with his partner's consent. Since a married man accused of adultery is condemned to death, there can obviously be no harsher punishment.

If he is unmarried (and does not qualify the definition of '*muhsan*')[19], the *hadd* punishment for consensual sex is 100 lashes while in the case of rape (*Zina bil-jabr*) the court can give (under clause 6(3) of the *Hudud* Ordinance) any other punishment – including death – besides the 100 lashes.

There is also a great difference between *tazir* punishments for rape and consensual sex, as laid down in clauses 10(2) and 10(3) of the *Hudud* Ordinance.

Punishment to Minors: Clauses 5 and 10 of the *Zina* Ordinance, which provide that a sane and adult person guilty of committing *Zina* would face punishments prescribed in these clauses, are objected against for two reasons. Firstly, most of the girls in Pakistan reach puberty at the age of 8-9 years. Although they are physically adolescents at this stage, they are in no way mentally mature enough to fully understand the gravity of the crime and its implications. It is, therefore, unjust to punish them. Secondly, as girls reach puberty sooner than boys, they become 'eligible' for punishment earlier. This is a kind of discrimination against women.

It should be realized here that the purpose of a law is not to punish the accused, as much as to prevent the causes of crime in a society. The more a law succeeds in preventing and checking the rate of crimes, the more comprehensive it would be.

It is a reality that when a boy or a girl attains puberty, s/he becomes able to fulfill sexual desires. There should be some law that can prevent them from committing the crime. If there was no such law in a country, it would only point to a flaw in the legal system there.

As for the fact that girls attain puberty earlier than boys, giving them exceptions cannot be made a general principle, since this may end up in making minors in the hands of criminals. However, the courts should – as indeed they do – ascertain the mental health of the accused to determine whether some concession or even exception can be made.

Women's witness: As noted earlier, there does exist a clause in the *Zina* Ordinance – clause 8(b) – that differentiates between a man and a woman. This is about women's witness in *hadd* cases. The Ordinance stipulates that witnesses against an accused in a *hadd* case should all be men. Here, the following points need to be kept in view:

First, this differentiation between men and women is only for *hadd* cases, not those that come under *tazir*. In *tazir* cases, women's witness is not only acceptable but the accused can even be punished on the basis of her witness if 'circumstantial evidence' corroborates it. This is what has in fact happened. Now, the factual position is that more than 99 percent cases registered under the *Zina* Ordinance come under *tazir*, while the number of *hadd* cases during the last 20-25 years can be counted on the fingers where, according to my knowledge, only one *qazf hadd* has been issued. So, in sum, non-recognition of women's witness in *hadd* cases has not made any real difference in practical terms.

Second, in the light of the Qur'anic verse "get two witnesses out of your men, and if there are not two men then a man and two women,"[20] a woman's witness is counted as half of a man's. While scholars have attempted to understand the reason and wisdom behind this injunction, such as the biological factors and the difference of role in society, in my view while we should try to research and understand the logic and wisdom behind all the Divine teachings and commandments, it is essentially a matter of faith. It is not necessary for a Qur'anic command to be implemented that we first understand its wisdom fully. Being Muslims, believing in the truth that is Qur'an, we submit to Allah's command, whether we comprehend its full wisdom or fail to understand the wisdom behind it.

There is another fine point here. A majority of scholars have observed that this verse of Al Baqarah creates a technical ground for doubt with regard to women's witness, which in turn, provides enough reason for not handing down a harsh punishment to the accused. This is in keeping with the spirit of Shari'ah injunctions and the purpose of prescribing a whole system of punishments for various crimes. Whereas Shari'ah has prescribed harsh punishments for *hadd* crimes, it also has laid down strict conditions that have to be met before meeting them out to the accused person. The Holy Prophet's instruction is to avoid *hadd* punishments as far as possible. They are there to maintain deterrence against crime, rather than victimizing people. This is why *hadd* punishments have been stopped from being carried out in many cases on the basis of even small doubts. Although the accused are given 'the benefit of the doubt' and acquitted according to the general rule of law, in *hadd* cases, this goes beyond 'plausible doubt' and *hadd* punishment is not given on the basis of mere technical grounds.

Yet, some *fuqaha* (Muslim jurists) among the *tabi'ie* (the generation of Muslims that came after the generation of the Companions of the Prophet), have observed that, in keeping with the criteria for women's witness as laid down in Al Baqarah, women's witness can be accepted in *hadd* cases as well. Therefore, there is room for further investigation, deep thinking and research on this subject. While a learned discourse on this delicate issue can be initiated, this can never become an excuse for scrapping the entire *Hudud* Ordinance, as some circles aspire.

Some Submissions

Aspects of the *Hudud* Ordinances that are, in my view, in need of review, are discussed below:

According to my understanding of the teachings of Qur'an and Hadith, I find no ground for '*Zina* liable to *tazir*.' *Zina* is either liable to *hadd*, or it is not *zina*. So, there is no justification in declaring a person a criminal if the *hadd* of *Zina* cannot be applied to him or her. The existing situation is that when conditions for *hadd* punishment are not fully met, a *tazir* punishment is awarded to the accused. Since, in such a case, the crime cannot be termed *Zina* but a lesser crime, this flaw needs to be removed from the *Zina* Ordinance.

Not only should the accused be acquitted on the basis of 'benefit of the doubt' under Clauses 5 and 10 of the *Zina* Ordinance, but the court should also ascertain whether the allegation was false. If it turns out to be false, the court should award a *qazf* punishment to the individual who filed the fake case. It should not wait for the wrongfully accused person to file this case. In fact, courts should prescribe appropriate punishments for filing false cases in general. This would check the tendency to file false cases for the sake of harassment.

The standard of '*tazkiyat-u shuhud*'[21] has been prescribed for witnesses for all punishments under the Ordinance. This means that the court would examine whether they meet the criteria for witness or not. However, the Ordinance does not identify a procedure by which to ascertain the validity of witnesses. In Islamic states of the past, '*tazkiyat-u shuhud*' was carried out through an institutional process. There used to be '*muzakki*' (those who ascertain) with the courts. But this institution is non-existent now, nor is it easy to institute it in the prevailing corrupt atmosphere. Therefore, there is a need to have some alternative arrangement to ascertain the standard of truthfulness and veracity of witnesses. Since there is no such thing in the *Zina* Ordinance, the courts attempt to observe the criteria for '*tazkiya*' as far as possible and as they understand it. This leads, at times, to very odd situations.

In my personal view, I think that during the cross-examination (*jarh*) of witnesses the other party can raise such questions that may meet the standard of *tazkiya*. A more comprehensive system where opponent parties can raise questions about the integrity and

truthfulness of witnesses may fulfill the purpose of '*tazkiyat-u shuhud*.' Scholars, legal experts and court officials should ponder over this and explore a better system.

Shari'ah does want to ensure that the harsh punishments in *hadd* cases are imposed as little as possible, and this is why it has laid down strict criteria in these cases. But this does not mean that *hudud* become totally irrelevant. In this regard, too, there is a need to ascertain as to what are the conditions in *Hudud* Laws that are not ordained (*nass*), yet come in the way of imposition of *hadd* punishments.

In addition to legislation about the *hadd* crimes the *Hudud* Ordinances also provide legislation for other crimes. They also prescribe quite lengthy and harsh punishments for these crimes. What has happened is that many *tazir* crimes that previously came under purview of the Penal Code have been included in the Ordinances but with larger sentences. It is not the aim of Shari'ah that people should undergo long jail terms while their families suffer and face hardships in their absence. With its system of prisons, Shari'ah seeks to curtail the rate and spread of crime, and bring about rectification. It also seeks to reform the individual who has committed a crime. It does not aim to make his relatives suffer for his sin. Muslim jurists have gone to the extent of observing that if one is given a long sentence, there should be 'intervals' so that one may meet the family members and fulfill their needs.

Conclusion

It should remain clear that *Hudud* Laws are just a small part of Islamic teachings. They do not make up the 'whole Islam.' Enforcement of these laws is a stage in the process of Islamizing society, not the final aim. Thus, there is a need to introduce comprehensive and well-coordinated reforms in other sectors of society, including education, economy, civil administration, enforcement of law, and the role of courts. It is unfortunate that the Islamization process could not move beyond promulgation of the *Hudud* Laws as planned. Needless to say, this did not produce the desired results. Since this all-inclusive, multifaceted reform process could not continue, some people say, the laws should be scrapped. But this is ludicrous reverse logic. If one step is taken in the right direction, it should not be retracted just because the next step is not taken. The right approach, instead, is to take the next step so that the former becomes more effective.

Our legal system prescribes punishments for all crimes, but due to weaknesses in the process of investigation as well as at courts, the crime rate is increasing rather than decreasing. New laws are introduced to curb drug-trafficking, yet the menace is not dying down. This does not mean that we should do away with the laws that were, in the first place, intended to uproot the problem. Instead, it calls for reforming the system from investigation to pursuance in courts. On the same grounds, the view that *Hudud* Laws should be scrapped merely because they have not produced the desired results so far is absurd. Rather, we should strive for reforms in the system within which they operate.

The need is to avoid taking extreme positions and, instead, appreciate the efforts of Islamization in the context of indigenous culture, the current situation and the challenges of modern times. Only with this spirit can we move ahead: removing the flaws in the existing laws and integrating them with other sectors.

---

1 The punishments prescribed in the Qur'an and *Hadith* for crimes of *Zina* (fornication, adultery and rape), false accusation, theft and drinking are called *hudud* (singular *hadd*).

2 Any punishment other than *hadd*, imposed by an Islamic state for a crime.

3 Al-Qur'an, Surah Al-Maidah 5:38, Al-Noor 24:2-10.

4 First promulgated on 10 February 1979, the *Hudud* Ordinance was later indemnified by the Parliament as part of the Eighth Amendment in the Constitution in 1985.

5 i) Amnesty International, *Pakistan*: *Honour killings of girls and women*, September 1999, p. 12 visit: http:// web.amnesty.org/library/pdf/ ASA330181999ENGLISH/ $File/ASA3301899.pdf
ii) Human Rights Watch, *Crime or customs? Violence against women in Pakistan*, recommendations, 1999 visit: http://www.hrw.org/reports/1999/pakistan/Pakhtml-02.htm# TopOf Pak

6 Shehla Zia, "Hudud Laws: Impact on Women", in Tarik Jan (ed.), *Pakistan between Secularism and Islam*, Institute of Policy Studies, 1998, pp. 317-337.

7 The *Qazf* Ordinance is one of the ordinances collectively known as the Hudud Ordinance.

8 *Report of the National Commission on The Status of Women on Hudud Ordinance 1979,* p. 15.

9 *Report of the National Commission on The Status of Women on Hudud Ordinance 1979,* p. 6.

10 *Report of the National Commission on The Status of Women on Hudud Ordinance 1979*, pp. 65-75.

11 *Report of the Commission of Inquiry for Women, August 1997*, p. 71.

12 Safia Bibi case, NLR 1985 SD 145.

13 Charles Kennedy, *Islamization of Laws and Economy*, Institute of Policy Studies, Islamabad, 1996, p. 63.

14 Shehla Zia, "Hudud Laws: Impact on Women", in Tarik Jan (ed.), *Pakistan between Secularism and Islam*, Institute of Policy Studies, 1998, p. 327. See also *Report of the Commission of the Inquiry for Women August 1997*, pp. 55-75.

15 See for example, Case of Allah Dad vs. Mukhtar (1992 SCMR 1273).

16 Sections 6 of the Muslim Family Laws Ordinance (MFLO) binds a husband to obtain written permission from his existing wife to contract another marriage while under Section 7 it is mandatory for him to intimate the Nazim Union Council/ Chairman Arbitration Council about the repudiation of the marriage. Since in most of the cases, this legal procedure is not followed and wicked people take benefit of it by falsely implicated their ex-wives in adultery cases if they remarry at any point of time. For details, see S.A. Abid, Encyclopedia of Family Laws in Pakistan, Shan Book Corporation, 1-Turnner Road. Opp. High /court, Lahore, pp. 36, 47.

17 See for example, case of Allah Dad vs. Mukhtar (1992 SCMR 1273).

18 Human Rights Commission of Pakistan, "*State of Human Rights in 2002*", Aiwan-i-Jamhoor, 107-Tipu Block, New Garden Town, Lahore, pp. 237-238.

19 *muhsan*: A Muslim adult man / woman who is not insane and has had sexual intercourse with a Muslim adult woman / man who, at the time he / she had sexual intercourse with her / him, was married to her / him and was not insane.

20 Al-Qur'an, Surah Al-Baqarah 2:282.

21 *tazkiyat-u shuhud*: The process of inquiry that the court employs to ascertain the eligibility and standard of a witness, and whether the witness is just or unjust. (Sanaullah vs the State PLD 1991 5C 186).